

June 3, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation in WC Docket No. 02-80

Dear Ms. Dortch:

On Friday, May 31, 2002, I participated in an *ex parte* meeting, *via* conference call, with Stan Scheiner, of the Commission's Office of General Counsel. During the meeting, Mr. Scheiner and I discussed the Commission's position before the Supreme Court in the *NextWave Bankruptcy* proceeding,¹ and its implications for this proceeding.

In particular, I pointed out that, in its brief, the Commission argued that the nondischargeability of license conditions is confirmed by analogy to the Bankruptcy Code's treatment of executory contracts. The Commission observed that, "[u]nder 11 U.S.C. 365(b), a debtor may 'assume' and thereby retain the benefits of [an executory] contract *only if* it cures all defaults and provides 'adequate assurance of future performance'; otherwise, the contract must be 'rejected.'" *Id.* at 33 (emphasis in original). The Commission further argued that, "[i]t is well established that a debtor cannot simultaneously seek 'discharge' of its obligation to make payments under such an agreement while retaining the benefits thereof; instead, *the debtor must either assume contractual duties along with the contractual benefits, or reject the contract in whole.*" *Id.* (emphasis added) (citations omitted).

I observed that the Commission's position before the Supreme Court was no different from SBC's in this proceeding. *See, e.g.*, Comments of SBC Communications Inc. at 2 (filed May 13, 2002) (nothing in the Communications Act or the Bankruptcy Code supports IDT Winstar's claim that it can formally reject Old Winstar's service agreements with ILECs, and thus avoid liability for a cure, but nevertheless retain the benefits of those agreements); *id.* at 3 ("section 365 provides that, if a purchaser wants to

¹ *Federal Communications Commission v. NextWave Personal Communications Inc.*, Nos. 01-653, 01-657, Brief for the Federal Communications Commission (filed May 2002) (*NextWave Brief*) (see attached).

take the benefits of an executory contract (such as Old Winstar's service arrangements with ILECs), the debtor must assume that contract, assign it to the purchaser, and cure any default, including paying any outstanding debt").

Mr. Scheiner questioned whether the Commission's position was distinguishable because, in this case, IDT Winstar has formally rejected its service agreements with ILECs. However, the Commission's analysis in the *NextWave* proceeding did not turn on whether a successor has assumed a contract (in whole or in part). To the contrary, the Commission focused on whether the successor seeks to take the benefits of an executory contract without assuming any liability, irrespective of whether the successor formally assumes or rejects the contract. *NextWave Brief* at 33 ("It is well established that a debtor . . . must either assume contractual duties along with the contractual benefits, or reject the contract in whole."). The Commission's analysis therefore is directly on point, and supports SBC's position that IDT Winstar cannot formally reject Old Winstar's service arrangements with ILECs while, at the same time, retaining the benefits of those agreements by requiring the ILECs to "transition" to it Old Winstar's circuits with no interruption, relocation or any other change in the use of such circuits.

Please include a copy of this submission in the record of the above-referenced proceeding. Please contact me at 202-326-8909 if you have any questions.

Sincerely,

/s/ Christopher M. Heimann
Christopher M. Heimann

cc: S. Scheiner
D. Weiner
J. Carlisle
G. Cooke
M. Carey